

**BEFORE THE  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY  
MASSACHUSETTS**

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**FIBER TECHNOLOGIES NETWORKS, L.L.C.**  
**140 Allens Creek Road**  
**Rochester, NY 14618**

**Complainant,**

**v.**

**TOWN OF SHREWSBURY ELECTRIC  
LIGHT PLANT**  
**100 Maple Avenue**  
**Shrewsbury, MA 01545-5398**

**Respondents.**

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**No. \_\_\_\_\_**

**COMPLAINT (HEARING REQUESTED)**

1. Fiber Technologies Networks, L.L.C. (“Fibertech”) makes this Complaint pursuant to G.L. c. 166, § 25A, and 220 C.M.R. § 45.00, seeking permanent relief from the Town of Shrewsbury Electric Light Plant’s (“SELP”) denial of Fibertech’s request to attach its communication fiber cables to SELP’s poles.

2. Fibertech requests relief because it is entitled, pursuant to G.L. c.166, § 25A, and 220 C.M.R. § 45.00, *et seq.*, to attach its communications fiber optic cables (“fiber”) to SELP’s poles, and because SELP’s stated reason for denying Fibertech access to its poles is insufficient as a matter of law to deny Fibertech such access.

3. Fibertech therefore seeks relief from the Massachusetts Department of Telecommunications and Energy (“DTE” or the “Department”) against SELP’s attempt to deny Fibertech access to SELP’s poles.

### **Parties**

4. Complainant Fibertech is a New York limited liability company with a principal place of business at 140 Allens Creek Road, Rochester, New York. Fibertech is a telecommunications service provider and has filed with the Department a Statement of Business Operations with proposed tariff. It is offering, initially, dark fiber for use by communications carriers (CLECs, ISPs, IXC's, ILECs), educational and governmental institutions, and businesses. As market conditions and economics dictate, Fibertech intends to supplement these offerings with additional services including local exchange voice and data services throughout the service territory of Verizon and long distance services throughout the Commonwealth of Massachusetts. Access to utility poles is essential to allow Fibertech to develop its network.

5. Respondent SELP is an electric light plant with a principal place of business at 100 Maple Avenue, Shrewsbury, Massachusetts. In addition to operating a light plant, SELP provides communications and Internet access service through the cable television system it operates in the Town of Shrewsbury. It is the only cable television operator in Shrewsbury.

### **Jurisdiction**

6. SELP is a "municipal lighting plant" within the meaning of G.L. c. 166, § 25A and 220 C.M.R. 45.02, and, as such, constitutes a "utility" regulated by G.L. c. 166, § 25A, and 220 C.M.R. 45.00, *et seq.*

7. SELP controls poles on which Fibertech seeks to attach its fiber. Thomas R. Josie is an "appropriate named recipient," within the meaning of 220 C.M.R. 45.03(2), designated by SELP to receive such a request for access.

8. As a telecommunications provider within the meaning of 47 U.S.C. § 224 and a common carrier within the meaning of G.L. c. 159 § 12, Fibertech is a person, firm or corporation

authorized to construct lines along, under and across public ways and, as such, constitutes a “licensee” within the meaning of G.L. c. 166, § 25A, and 220 C.M.R. 45.02. Accordingly, Fibertech is entitled to nondiscriminatory access to SELP’s poles, ducts, conduits, and rights-of-way.

9. Fibertech has requested access to SELP’s poles for the attachment of its fiber. For almost one year, SELP has entirely denied such access.

10. The Department has jurisdiction over this Complaint and over SELP pursuant to G.L. c. 166, § 25A (“Section 25A”) and the regulations promulgated thereunder by the Department at 220 C.M.R. § 45.00, *et seq.* (the “DTE Regulations”).

### **Statement of Facts**

#### **SELP’S Wrongful Denial of Access to Fibertech**

11. Fibertech initially requested attachment to SELP poles on or about September 26, 2000, when Jennifer Starks, a consultant working on behalf of Fibertech, had a telephone conference with Thomas R. Josie, General Manager of SELP, in which she requested a pole attachment agreement and license to attach to SELP’s utility poles on behalf of Fibertech. During this call, Mr. Josie stated that SELP does not allow anyone on their poles, stating, “there’s nothing in it for me.” A true copy of Jennifer Starks notes regarding the September 26, 2000, telephone conference is attached to the Affidavit of Jennifer Starks as Exhibit A and incorporated herein by reference.

12. On or about October 2, 2000, Fibertech then sent to Mr. Josie a letter requesting a pole attachment agreement and license to attach to SELP’s utility poles. Attached to this was a list of the SELP poles and locations where Fibertech wished to attach. A true copy of Fibertech’s October 2nd letter is attached to the Affidavit of Jennifer Starks as Exhibit B and incorporated herein by reference.

13. Jennifer Starks had a further telephone conference with Mr. Josie on or about October

17, 2001. At that time, Mr. Josie informed Ms. Starks that SELP would not agree to *any* pole attachment agreement whereby Fibertech would retain ownership of the cable, again stating, “there’s nothing in it for me”. Mr. Josie stated that Fibertech’s only option would be to lease fiber optic cable from SELP. A true copy of Jennifer Stark’s notes regarding the October 17, 2000, telephone conference is attached to the Affidavit of Jennifer Starks as Exhibit C and incorporated herein by reference.

14. SELP has persisted in this position since then. SELP sent to Fibertech an outline for a lease of fiber optic cable in Shrewsbury on or about November 1, 2000, a true copy of which is attached to the Affidavit of Jennifer Starks as Exhibit D. Fibertech was unwilling at that time and has continued to be unwilling to lease fiber from SELP.

15. After further discussion with SELP, Fibertech sent to Mr. Josie another letter on or about May 11, 2001, discussing Fibertech’s proposal to SELP for the attachment of fiber to SELP’s poles. A true copy of Fibertech’s May 11th letter is attached to the Affidavit of Mario Rodriguez as Exhibit A and incorporated herein by reference.

16. After a phone conversation on May 15, 2001, in which Mr. Josie vaguely stated “we are at where we are,” Fibertech delivered another letter to Mr. Josie on or about May 15, 2001, squarely putting the question before SELP: “Will Shrewsbury’s Electric Light Plant allow Fibertech to attach its communication fiber cables to Shrewsbury’s poles and own them or must Fibertech, in order to attach to the poles, give the cables to Shrewsbury’s Electric Light Plant and then lease them back from Shrewsbury, as you have proposed?” A true copy of Fibertech’s May 15th letter is attached to the Affidavit of Mario Rodriguez as Exhibit B and incorporated herein by reference.

17. On May 23, 2001, Mr. Josie phoned Fibertech and stated to Mario Rodriguez that SELP would “stand basically on the present proposal to Fibertech” whereby “Shrewsbury will own the

cables.”

18. By a further letter to Mr. Josie dated June 7, 2001, Fibertech reiterated formally its request for access to SELP’s poles for Fibertech’s communication fiber. A true copy of Fibertech’s June 7, 2001, letter is attached to the Affidavit of Mario Rodriguez as Exhibit C and incorporated herein by reference.

19. By letter dated July 19, 2001, SELP confirmed its denial to Fibertech of access to SELP poles. A true copy of SELP’s July 19, 2001, letter is attached to the Affidavit of Mario Rodriguez as Exhibit D and incorporated herein by reference. SELP’s July 19, 2001, letter denied access to Fibertech on the sole grounds that “Fibertech is not entitled to a grant of location pursuant to G.L. c. 166, §§ 21, 22 and as such, it does not qualify as a licensee pursuant to G.L. c. 166, § 25A.”

20. Despite the foregoing efforts to reach agreement over the past year, SELP and Fibertech have been unable to reach agreement regarding Fibertech’s access to SELP’s poles. In light of the efforts undertaken by the parties to date, and the position of SELP set forth in its July 19, 2001, letter, Fibertech believes that any further efforts to resolve the issue prior to the filing of this Complaint would be futile.

**SELP’s Denial of Access Was Improper Because  
Fibertech is Entitled to Access to SELP’s Poles**

21. Both federal and state statutes address the regulation of pole attachments. The Federal Pole Attachment Act of 1978, as amended, 47 U.S.C. § 224 (the “Act”), authorizes the Federal Communications Commission (“FCC”) to regulate the rates, terms, and conditions for pole attachments by all forms of communications providers. Section 224(f)(1) of the Act requires utilities to provide a cable television system or a telecommunications service provider with nondiscriminatory access to poles, ducts, conduits or rights-of-way owned or controlled by them. As part of its promotion of

competition and new technologies in telecommunications, the Telecommunications Act of 1996 expanded regulation of pole attachments by providing an affirmative right of access to poles, ducts, conduits, and rights-of-way owned by utilities. *See Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of Way and to Enhance Consumer Access to Telecommunications Services*, D.T.E. 98-36-A, \*2 (July 24, 2000)(the “98-31-A Order”)(discussing intent of Telecommunications Act of 1996).

22. This regulatory scheme is based on the premise that utility owners of poles and rights-of-way have a monopoly over an essential facility for telecommunications competition. Section 224 was enacted “to ensure that the deployment of communications networks and the development of the Telecommunications Act of 1996 of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.” *In the Matter of Implementation of Sections 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules Governing Pole Attachments*, FCC Report and Order, CS Docket No. 97-151 at ¶ 2 (Feb. 6, 1998). Because of this scarcity and control, these poles and rights-of-way have been recognized as a bottleneck monopoly by Congress,<sup>1</sup> the FCC,<sup>2</sup> the Department of Justice,<sup>3</sup> the United States Supreme Court,<sup>4</sup> and lower federal courts.<sup>5</sup>

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<sup>1</sup> See e.g. S. Rep. No. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 13 (1977) (“owing to a variety of factors, including environmental or zoning restrictions in the cost of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space and existing poles”).

<sup>2</sup> E.g., *Section 214 Certificates*, 21 F.C.C. 2<sup>nd</sup> 307, 323-29 (1970) (cable operators “have to rely on the telephone companies for either construction or lease of channel facilities or for the use of poles for the construction of their own facilities. Telephone company has monopoly.” Effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems.”)

<sup>3</sup> See e.g. *United States v. AT&T*, Civ. No. 74-1698 (D.D.C.), Plaintiffs’ First Statement of Contentions and Proof, (filed Nov. 1, 1978)(cataloging AT&T dominance of pole and conduit facilities; “[t]he cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative”).

<sup>4</sup> *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 1987 (“utility company poles provide . . . virtually the only practical physical medium for the installation of television cables”).

<sup>5</sup> *United States v. Western Electric Co.*, 673 F.Supp. 525, 564 (D.D.C. 1987)(cable T.V. operators “depend on permission from the [RBOCS] for attachment of their cables to the telephone companies poles . . . companies and the

23. Section 224(c)(1) of the Act authorizes states to take jurisdiction over pole attachments consistent with the provisions of the Act. Massachusetts exercises this authority through its own statute; this statute therefore regulates Fibertech's pole attachments in Massachusetts. *See 98-36-A Order* at 2.

24. Section 25A grants the Department the authority "to regulate the rates, terms and conditions applicable to attachments" and to "determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree." G.L. c. 166, § 25A, ¶ 2. Section 25A also empowers the DTE to regulate access to pole attachments. *98-36-A Order* at 2-3.

25. In its *98-31-A Order*, the Department adopted the DTE Regulations pursuant to the authority granted by the Act and Section 25A. *Id.* The DTE Regulations were implemented, in part, "to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled, in whole or in part, by one or more utilities with rates, terms, and conditions that are just and reasonable." 220 C.M.R. 45.01. The DTE Regulations incorporate the federal Act's requirement that utilities provide nondiscriminatory access to poles, ducts, conduits, or rights-of-way owned or controlled by them. The DTE regulations provide:

A utility shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, for the purposes described in M.G.L. c. 166, § 25A, owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee access to its poles, ducts, conduits, or rights-of-way on a nondiscriminatory basis for valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown.

220 C.M.R. 45.03(1).

26. Section 25A contains several definitions that establish what entities must grant access to

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sharing of their conduit space . . . .In short, there does not exist any meaningful large-scale, alternative to the facilities

poles, what entities are entitled access to poles, and what equipment can be attached to the poles.

Under Section 25A and the DTE regulations, a “utility” is defined as “any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits, or rights-of-way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power.” G.L. c. 166, § 25A, ¶ 1; 220 C.M.R. 45.02. This definition is broader than the definition of utility under the Telecommunications Act because, among other things, it explicitly recognizes municipal lighting plants such as SELP as utilities that must provide nondiscriminatory access under Section 25A. *See 98-36-A Order* at 6 (discussing differences in federal and state definitions).

27. The DTE also recognized that “[a] utility that itself competes in the markets for telecommunications and cable services, either directly or through an affiliate or associate company, must not use its ownership or control of pole attachments . . . to favor itself or its affiliates” and required that a utility must charge itself and its affiliates, subsidiaries or associate companies an amount equal to the pole attachment rate for which the utility would be liable. 220 C.M.R. 45.10; *98-36-A Order* at \*19. This language suggests that the DTE is particularly sensitive to situations where utilities use their ownership of poles to obtain a competitive advantage for themselves or their affiliates, or impose disadvantages on potential competitors. In *Marcus Cable Associates L.P. v. Texas Utilities Electric Co.*, DA 97-1527 (released July 21, 1997), the FCC found that the likelihood of direct competition between the utility and a cable operator “magnifies the unreasonableness” of the terms and conditions being challenged, and concluded that these requirements “appear to be an attempt by [the utility] to interfere with the provision of telecommunications services by a potential, or actual competitor.” *Id.* at 8, 10, 11-12, ¶¶ 20, 23, 27. Through the fiber optic facilities of the Shrewsbury cable television system, SELP will compete with the services offered over the facilities Fibertech will install if given



access to SELP's poles.

28. A "licensee" is defined by Section 25A and the DTE regulations as "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways." G.L. c. 166, § 25A, ¶ 1; 220 C.M.R. 45.02. Massachusetts General Laws Chapter 166, Section 21, authorizes entities providing for transmission of intelligence by electricity or telephone, the transmission of television signals, or the transmission of electricity for lighting, heating or power, to "construct lines for such transmission upon, along, under and across the public ways," so long as such construction does not "incommode the public use of public ways or endanger or interrupt navigation." G.L. c. 166, § 21. Section 224 of the Telecommunications Act of 1996, pursuant to which the Department amended its regulations in the *98-31-A Order*, provides for pole attachments by any "provider of telecommunications service." See 47 U.S.C. § 224 (1)(4). Telecommunications service involves the transmission of intelligence by electricity or by telephone. Fibertech's business involves leasing dark fiber, a telecommunications service. The Department has recognized that the leasing of dark fiber constitutes "telecommunications service." See *Petition of Global Naps, Inc. against New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts regarding dark fiber*, D.T.E. 98-116 (April 2000), Civil Action 00-10938-RWZ (D. Mass., July 11, 2001). In the Statement of Business Operations that Fibertech has filed with the DTE, Fibertech also has applied for authority to provide local exchange services, interexchange service and data services.

29. Fibertech therefore is a company incorporated for the transmission of intelligence by electricity or by telephone, and such a company is authorized, pursuant to G.L. c. 166, §§ 21, 22, to construct lines upon, along, under and across the public ways. By virtue of such authorization, Fibertech constitutes a "licensee" within the meaning of Section 25A and 220 C.M.R. 45.02. Fibertech is therefore entitled to nondiscriminatory access to SELP's poles, ducts, conduits, and rights-of-way.

30. “Attachment” is defined as “any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole . . .” Mass. Gen. Laws. c. 166, § 25A, ¶ 1; 220 C.M.R. 45.02. In the context of “overlapping” by cable television operators, the FCC has made it clear that, to encourage employment of fiber optic facilities, such facilities are entitled to attachment to utility poles. *See Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, FCC 98-20 at 31, ¶ 62 (released Feb. 6, 1998). Because Fibertech’s fiber is “cable for the transmission of intelligence,” Fibertech is entitled to attach its own cable to utility poles consistent with the provisions of Section 25A, and its attachment is in the public interest to foster the growth of competition and advanced services in communities that other new entrants have passed by.

31. Under the DTE Regulations, therefore, utilities, including municipal lighting plants such as SELP, must provide Fibertech with nondiscriminatory access to its poles for the attachment of Fibertech’s fiber optic lines unless they can demonstrate insufficient capacity or that such access will compromise or undermine the safety, reliability, or generally applicable engineering standards of its poles, or unless it can demonstrate other valid concerns.

### **SELP’s Denial of Access Was Improper**

31. The DTE Regulations, 220 CMR 45.03(2), require that a denial of access be specific, include all relevant information supporting the denial, and explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

32. SELP’s denial of access was not based on reasons of lack of capacity, safety, reliability, or engineering standards or any other basis that could be characterized as “good cause shown.” SELP’s denial letter contains no relevant information supporting the denial, nor does it explain

how the denial of access relates to any claimed lack of capacity, safety, reliability, engineering standards or other cause. Instead, SELP has made clear through its representative Mr. Josie that it does not intend to permit any attachments by a competing fiber optic provider.

33. Fibertech's proposed attachments will not adversely affect SELP's poles for reasons of lack of capacity, safety, reliability or engineering standards. In fact, it has been the practice for utilities to enter into pole attachment agreements that provide terms and conditions to attach to the utility poles or conduits in general, with licenses for attachment with specific locations then issued pursuant to the general agreement as needed. Municipal grants of location have not been required as a condition precedent to a pole attachment agreement.

#### **Prayer for Relief**

34. WHEREFORE Fibertech respectfully requests that the  
Department:

- a. Order SELP to allow Fibertech immediate access to its poles upon just and reasonable terms, rates, and conditions; and
- b. Award other just and appropriate relief.

#### **Hearing Requested**

35. Fibertech requests, pursuant to 220 C.M.R. § 45.04(2)(i), that a hearing be convened pursuant to 220 C.M.R. § 1.06, and that it be permitted to submit a brief in support of its contentions.

Respectfully submitted,

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Dated: August 27, 2001

**BEFORE THE  
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**FIBER TECHNOLOGIES NETWORKS, L.L.C.**  
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**Respondents.**

**No. \_\_\_\_\_**

**CERTIFICATE OF SERVICE**

I, Cameron F. Kerry, hereby certify that I have this 27<sup>th</sup> day of August, 2001, served the foregoing, Complaint (Hearing Requested), upon on Thomas R. Josie, General Manager, Town of Shrewsbury Electric Light Plant, 100 Maple Avenue, Shrewsbury, MA 01545-5398, by overnight delivery.

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Cameron F. Kerry